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HOW THE GOOD-WILL IS TO BE DEALT WITH IN
PARTNERSHIPS.

The good-will of a trade, business or house, is the value of that reputation which it has acquired during its continuance, and which induces the confidence or expectation that the same or an increasing patronage will continue to be extended toward the same so long as it is conducted in the same place, upon the same principles. As Lord ELDON said, in *Crutwell v. Lye*, 17 Vesey, 336, 346: "The good-will of a trade is nothing more than the probability that the old customers will resort to the old place." The character and value of a good-will is very similar, in many respects, to those of a trade-mark. It serves as an assurance to the customers, or purchasers, that they are being dealt with fairly, or are obtaining the goods they desire. And Courts of Equity protect the property in both much upon the same principle; that those who have created either a good-will or a trade-mark, must have done it by a long continuance of fair dealing, and are therefore justly entitled to the advantages by way of continued patronage flowing or likely to flow therefrom. And, on the other hand, it is considered that one who assumes the business name or the trade-mark of another, does it for the purpose of imposing upon the public a false belief that he is the person whose business name he assumes, or that

he sells the very manufacture which the trade-mark indicates. This abuse is, therefore, restrained in equity by temporary and perpetual injunctions, both upon the ground of wrong to the owner, in depriving him of a just patronage which he would otherwise receive, and equally of fraud and imposition upon the public in regard to the persons with whom they are dealing, or the commodities which they are purchasing.

Having sufficiently defined the nature of good-will, and why it is recognized by the courts, and protected as an essential and valuable interest and property, we have to consider how the same is to be dealt with in closing up mercantile and other partnerships.

Good-will seems to consist of two parts: the right to carry on the same business in the old place and in the old name, and the right to exclude all others from carrying on a similar business in the old name, or one so similar as not to indicate plainly to the general public that there has been any change. For the impression upon the public mind that no change, or at least no essential change, has occurred in the business, seems to be largely of the essence of the good-will. So also does the right to exclude all others from so far carrying on a similar business, at or near the same place, as materially to interfere with the value of the old business, form a very important element in the value of any partnership good-will. The mere right, therefore, to carry on the old business at the old place, and in the old name, must always be regarded as a somewhat precarious property, and is only the lowest and least valuable species of good-will. But this seems to be all that ordinarily attaches to a mere trading partnership. The articles of copartnership, or the contract upon which the association is founded, whether oral or written, may and sometimes do provide for securing the good-will of the business exclusively to the partnership, and in case of dissolution, either by efflux of time, or the act of either party, or any other unforeseen event, the contract may, and in strictness ought to, provide for the sale of the good-will, as a partnership effect, and for the guaranty of its protection from all infringement by any of the partners, their agents or representatives. In such cases there can be no

doubt or difficulty in treating the good-will as a distinct and appreciable portion of the effects of the partnership: *Kennedy v. Lee*, 3 Mer., 441; *Bryson v. Whitehead*, 1 Sim. & Stu., 74; *Harrison v. Gardner*, 2 Madd., 198.

To this extent the good-will of a business carried on at a shop, or other place of business, is ordinarily understood to pass by the conveyance of the place where the business has been up to the time carried on: *Chissum v. Dewes*, 5 Russ., 29. But unless there be some covenant or contract, express or implied, on the part of the former owner, not to engage in the same business at the same place, there will be no mode of hindering or excluding him from doing so. And on that account, as we have before said, all such good-will must be regarded as extremely precarious, depending so much upon the continued voluntary forbearance of the former owner. At the present day it is presumable that very few such contracts are made without being guarded by express stipulations against interference on the part of the former owner.

But the same uncertainty occurs in case of every mercantile or trading partnership (and it is much the same with partnerships for carrying on mechanical business), whenever it becomes necessary to close up one of either class, and dispose of the effects and distribute the avails to those entitled. If the organic contract of the association does not afford any definition of the extent and mode of disposing of the good-will, it is of necessity subject to all the uncertainties and contingencies which we have already stated.

This is very well illustrated by the leading case of *Cook v. Collingridge*, Jac., 607, tried before Lord ELDON. There seems to have been no hesitation, on the part of his lordship, in treating the good-will of the partnership as a partnership interest to be disposed of with the property. But as there was no stipulation in the fundamental contract for its protection from infringement by any of the partners setting up a similar business at the same place, there seemed no practicable mode of treating the good-will of the concern as a distinct portion of the partnership effects, and, as such, subject to a separate valuation. His lordship, therefore, ordered, with much minuteness of

detail, that the estates and effects of the partnership should be sold at public auction, and that the different partners might be allowed to compete at the sale, and to enable strangers to have the same understanding of the probable value of the good-will appurtenant to the property, it was ordered that the conditions of sale, to be made known to the bidders in advance of the time of final sale, should contain a statement of the profits for three or four years preceding and the names of the customers.

This case probably presents the fair and full state of the law of partnership good-will at the time, and we are not aware that it has received any essential modification since. Whenever the partnership effects are to be converted into money, the good-will forms a portion of such effects, either as appurtenant to the ownership of the property and the right to occupy the place where the business has been before carried on, or as a separate and distinct right to continue the same business at the same place and in the same name, and to exclude all others from exercising a similar privilege to the extent of infringing the exclusive rights of the purchaser of the good-will.

Those two species of good-will may conveniently be distinguished as good-will in gross and good-will appurtenant to the place and property. The latter species is probably of the most frequent occurrence in partnerships, and by far the most difficult to deal with. All good-will must be of this character, in partnerships, where the fundamental contract contains no stipulations for its protection from being interfered with by the partners after the disposition of the effects of the concern. It follows, of course, in this species of good-will, where the partnership is dissolved by the death of one partner, that the good-will must attach mainly to the survivor, since he is at liberty to continue the same business at the same place and in the same name, so far as his own name is concerned. And the sale of the property will not give the purchaser the right to carry on the business in the old name, except where the partnership contract contains stipulations to that effect. This species of good-will, therefore, which is merely appurtenant to the place or property, cannot ordinarily be of much value. But, such as it is, the courts seem inclined to treat it as belonging to the partnership, and

not attaching to the separate partners. *Williams v. Wilson*, 4 Sandf. Ch., 379. Receivers are sometimes allowed to carry on the partnership business for a time, in order to preserve the good-will, which they cannot ordinarily do. *Martin v. Van Schaick*, 4 Paige, 479. The question of the sale of good-will is somewhat extensively examined and very ably discussed by BIGELOW, Ch. J., in *Angier v. Webber*, 14 Allen, 211, where the present state of the law is clearly set forth. And in *Churton v. Douglas*, Johns. Eng. Ch., 174, it seems to be considered that the sale of a business impliedly carries the right to use the old name in future, and an implied duty, on the part of the vendor, not to use that name in carrying on any similar business near the same place. But there will commonly be some clew whereby as matter of fact the intent of the parties may be inferred, and this must control.

The American courts and text writers seem not to have given us always very definite notions upon the subject of the good-will in partnerships, and where they have, there does not seem to be an entire agreement among them in regard to the precise principles which should be applied to it. Thus Chancellor KENT, 3 Comm., 64, declares that the good-will of a trade is not partnership stock, and that it has been held to be the property of the survivor, "which the law gives him to carry on the trade, and that the representatives of a deceased partner cannot compel a division of it," citing the earlier English cases, and expressing some doubt how far *Crawshay v. Collins*, 15 Vesey, 218, may be entirely consistent with his main proposition, but intimating that all question is removed by *Lewis v. Langdon*, 7 Sim., 421. This latter case decides nothing, but merely grants a temporary injunction until the right could be tried at law. And the doubt expressed in *Crawshay v. Collins*, whether the good-will of the trade went to the survivor has long since ripened into the settled rule of law. The rule of law now seems to be entirely well-settled in England—*Smith v. Everett*, 27 Beav., 446—that the good-will in a partnership business does not, on the death of one partner, survive beneficially to the others. When it has any value a due proportion belongs to the estate of the deceased partner, but the surviving partner has still the right

to carry on the same business, and at the same place. This seems to be intelligible, reasonable, and susceptible of practical application, and, we think, will be found the true rule at the present time, although declared by Lord ROMILLY more than ten years since. This is precisely in accordance with the rule adopted by Lord ELDON, in *Cook v. Collingridge*, as before stated.

But in *Robertson v. Quiddington*, 28 Beav., 529, it was held that there was no good-will of a partnership separate from the property of the firm and the place where it was carried on. And it seems to have been considered, on the authority of *Lewis v. Langdon*, 7 Sim., 421, that the surviving partner was entitled to the use of the firm name, and if he owned the place, or could obtain title to the use of it, could carry on the old business at the same place without interference, on the part of a legatee, of a portion of the good-will, the remedy of the legatee, if any, being against the executor, who had assigned the testator's interest in the trade premises to the surviving partner, and might, therefore, very naturally be supposed to have received a consideration for the good-will of the business incident or appurtenant to the same. And in *Bradbury v. Dickens*, 27 Beav., 53, the question arose in regard to the good-will attaching to the publication of *Household Words*, which had been published for a period by the plaintiff and others, in connection with the defendant, he acting as editor. It was held that the right to use the name must be sold for the benefit of the partners, it being part of the partnership assets, and that the defendant could not, therefore, be allowed to advertise its continuance, except so far as concerned himself.

It may be regarded, therefore, we think, as well-settled in the English courts, that the good-will of a partnership, either as appurtenant to the property or in gross, according to the nature of the contract, is to be regarded as a portion of the assets, and as such, must be disposed of in closing the concern. And the same rule seems to be recognized in this country, as far as the subject has been definitely passed upon by the courts. In *Dougherty v. Van Nostrand*, 1 Hoff. Ch. Rep., 68, it was held that on a dissolution of the partnership the good-

will must be sold, and that it does not belong to the surviving partners. The same is held in *Holden v. M' Makin*, 1 Parsons Cas. Eq., 270; *Dayton v. Wilkes*, 17 How. Pr., 510.

It has been held that the good-will of a professional business is so exclusively made up of personal confidence, that it is not susceptible of sale: *Austen v. Boys*, 27 Law J. Ch., 714. But that rule has not commonly been adhered to in this country—certainly not to the fullest extent. In *Butler v. Bruleson*, 16 Vt., 176, it was held that a contract on the part of a physician not to practice within a certain distance of another physician, was a binding contract, and one which Courts of Equity will enforce by injunction.

The good-will of a business has been held incident to the stock and lease, and not to premises where the business was carried on. *England v. Downs*, 6 Beav., 269; *Dougherty v. Van Nostrand*, *supra*. But the good-will of a business may pass as appurtenant to the shop where it was carried on. *Chissum v. Dewes*, 5 Russ., 29.

There is no principle of law better settled, or more uniformly acted upon by the Courts of Equity, than that the property in good-will shall have the protection afforded by injunction: *Elves v. Crofts*, 14 Jur., 855. Courts of Equity always interfere to prevent a party from carrying on a similar business in a similar name, so near the old place of business as materially to lessen its profits, or deceive the public as to the fact of who are the real successors to the former proprietors, whenever such party is under any legal obligations to refrain from doing so, whether the obligation result from express stipulation or implied duty resulting from participating in the price of the sale of the good-will of the old business: *Perry v. Truefitt*, 6 Beav., 66; *Motley v. Downman*, 1 My. & Cr., 14; *Knott v. Morgan*, 2 Keen, 213, 219; *Hogg v. Kirby*, 8 Vesey, 215; *Bell v. Locke*, 8 Paige, 75. And the fact that there was no intentional deception will not excuse the party: *Millington v. Fox*, 3 My. & Cr., 338.

But it seems questionable sometimes, upon principle, how far the mere sale of a business or good-will, either in gross or as appurtenant to certain property, real or personal, which is the

more common mode, will justify the use of the names of the vendors or of the old firm in continuing it, without adding successors, or some indication that the vendors are not still personally responsible. It would be obvious, in some cases, that no such thing could have been expected, as, for instance, where the business had always been carried on in the names of the vendors, and there had been no long continuance of the house, and where permission to continue the names of the vendors would carry responsibility for all the undertakings of the vendees, or any succession of partners. But in other cases, where the firm name had become the name of the house, without reference to the names of the owners, as is not uncommon with mercantile and banking houses in this country, to some extent, and very largely in European countries, it might be more natural to expect, in the sale of the business, that the purchaser might expect to continue the old name. See *Howe v. Searing*, 6 Bosw., 354. But always, it is presumed, the old name may be used by giving proper indemnity to the vendors. So that this must depend very much upon circumstances.

Having thus referred, very briefly, to most of the decided cases upon the subject of the good-will of partnerships, and the manner in which it is to be treated in closing their accounts, it seems very obvious to conclude, as we have already sufficiently indicated, that it is always to be regarded as a property belonging to the concern, more or less valuable, according to circumstances, but always to be so disposed of as to be rendered most available to all the partners, so far as may be consistent with the fundamental contract of the association and the particular circumstances resulting in the dissolution. I. F. R.